NO. 17-1351

United States Court of Appeals
for the
Fourth Circuit

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., on behalf of itself; HIAS, INC., on behalf of itself and its clients; MIDDLE EAST STUDIES ASSOCIATION OF NORTH AMERICA, INC., on behalf of itself and its members; MUHAMMED METEAB; PAUL HARRISON; IBRAHIM AHMED MOHOMED; JOHN DOES #1 & 3; JANE DOE #2,

Plaintiffs-Appellees,

– v. –

DONALD J. TRUMP, in his official capacity as President of the United States; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF STATE; OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; REX W. TILLERSON, in his official capacity as Secretary of State; DANIEL R. COATS, in his official capacity as Director of National Intelligence,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT IN CASE NO. TDC-17-0361
THE HONORABLE THEODORE D. CHUANG, U. S. DISTRICT COURT JUDGE

BRIEF FOR *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

SIDNEY S. ROSDEITCHER*
AIDAN SYNNOTT
ERIN J. MORGAN
ARIANNA MARKEL
JARED S. STEIN
1285 Avenue of the Americas
New York, New York 10019-6064
Phone: (212) 373-3000

LINDA A. KLEIN
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 60654
Phone: (312) 988-5000
abapresident@americanbar.org

* Counsel of Record

Counsel for Amicus Curiae American Bar Association

Date: April 19, 2017

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* American Bar Association ("ABA") discloses that it is an Illinois nonprofit corporation, has no parent corporation, and does not issue shares of stock. ABA is a national voluntary organization whose members include attorneys, law students, and related professionals.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA's membership of over 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.

The ABA's mission is "[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession." Among the ABA's goals is to "[i]ncrease public understanding of a respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," to "[a]ssure meaningful access to justice for all persons," and to "eliminate bias in the . . . justice system."[2]

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[1] Pursuant to Federal Rule of Appellate Procedure 29, the ABA certifies that no counsel for a party authored this brief in whole or in part, and that no party, no party's counsel, and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission. All parties have consented to the filing of this *amicus curiae* brief.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[2] *See* ABA Mission and Association Goals, *available at* http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited Feb. 13, 2017).

Since its founding in 1878, the ABA has worked to protect the rights secured by the United States Constitution, and its system of separation of powers, including the role of the judiciary as a check against arbitrary exercises of Executive and legislative power that invade individual rights. As the voice of the legal profession, the ABA has a special interest and responsibility in safeguarding the integrity of our legal system, ensuring the sanctity of the rule of law, and protecting the rights guaranteed by the United States Constitution. Preserving and promoting robust judicial review of executive action goes hand-in-hand with these responsibilities, particularly where executive action encroaches on the Constitution's fundamental protections or important statutory protections.

Consistent with its steadfast support for preserving the promises of the Constitution and the protection of the rule of law, the ABA recently adopted Resolution 10C, which urges the Executive to "[n]ot use religion or nationality as a basis for barring an otherwise eligible individual from admission to the United States."[3] The Resolution also expresses the concern that the Executive Order raises "legal, procedural, and rule of law issues."[4]

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3 American Bar Association, *ABA Resolution 10C* at 16 (adopted Feb. 6, 2017) *available at* http://www.americanbar.org/content/dam/aba/images/abanews/2017%20Midyear%20Meeting%20Resolutions/10c.pdf (last visited Apr. 12, 2017).

4 *Id.* at 5.

The ABA has a strong interest in seeing that similar issues raised by the revised Executive Order are subjected to searching judicial review and resolved in a manner that honors the fundamental protections for individuals under the United States Constitution and the laws enacted by Congress. In urging the Court to affirm the district court's order, the ABA focuses especially on the Order's discrimination on the basis of national origin, which the ABA submits violates a Congressional prohibition of such discrimination and is at odds with the nation's fundamental values.

SUMMARY OF ARGUMENT

This is a nation of immigrants. It has its origins in refugees fleeing religious persecution in Seventeenth Century England. The Statue of Liberty in New York Harbor sends a message of welcome and shelter to all seeking refuge and the freedom, equality, and opportunity which the United States represents. Yet our immigration policies include a regrettable history of invidious discrimination based on national origin. In 1965, in a measure reflecting the same spirit as our civil rights revolution, Congress enacted the Immigration and Nationality Act of 1965, Pub. L. 89-236, 79 Stat. 911, to dismantle a discriminatory quota system and expressly forbid the use of national origin as a basis for immigration to the United States. In doing so, it understood it was eliminating, once and for all, a form of discrimination which had stained our nation's immigration policies and was at odds with the Nation's most fundamental values.

The revised Executive Order ("Order")[5] at issue would reverse that progress. The District Court and Plaintiffs-Appellees ("IRAP") demonstrate that the Order violates the Establishment Clause. But the Order on its face also violates the 1965 Act's prohibition on national origin discrimination. The Government claims that an earlier law, the 1952 Immigration and Nationality Act, which delegated to the President the power to exclude classes of persons when he deems it in the national interest, enables him to override the 1965 Act's prohibition on national origin discrimination and empowers him to impose a travel ban on persons from six overwhelmingly Muslim nations. That argument violates basic principles of statutory interpretation and would frustrate the goals of the 1965 Act.

Moreover, even if there were some exceptional circumstances in which the President could use the 1952 delegation of power to exclude persons based on their country of origin, it is inconceivable such power could be used without some legitimate justification. Here the Order itself, and the record developed so far, do not support the proffered national security justification for class-wide discrimination on the basis of national origin. For example, the Order cannot come up with a single example of any national of five of the six countries

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5 Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

now subject to the travel ban ever committing a terrorist act after being admitted to the United States, and offers only a single, inapposite example for the sixth; an internal report of the Department of Homeland Security rejects any such link between country of citizenship and national security. The Order, in short, appears to be an arbitrary exercise of Executive power which harms not only the foreign nationals excluded from the United States, but disrupts close family and business or academic relationships that many American citizens and permanent residents have with these foreign nationals.

Yet the Government offers a number of doctrines in the hope of effectively immunizing the Order from judicial review. Its arguments assume that Congress can give the President unlimited powers, even the power to violate the Constitution or duly enacted laws, no matter how unsupported the justification. Such an unlimited, judicially unreviewable power would be contrary to the rule of law principle that no government official, even the President, is above the law. And it would violate the basic constitutional role of the judiciary in our system of separation of powers to act as a bulwark against violations of individual rights by our political branches.

ARGUMENT

I. The Order Violates the 1965 Immigration and Nationality Act's Prohibition on National Origin Discrimination and Our Nation's Most Fundamental Values

The United States has long been a beacon to the world, inviting to our shores all who seek the freedom, equality, and opportunity it represents. That we are a nation of immigrants is both a truism and a source of pride. Yet our immigration policies have a regrettable history of discrimination based on race and national origin. In 1965, Congress took steps to correct that history by enacting an Immigration and Nationality Act that banned, among other things, discrimination in the issuance of immigration visas on the basis of race and national origin. That ban was not some technical, narrow adjustment. It was a broad pronouncement that race and national origin were no longer to be a basis for excluding foreign citizens from the United States. It was a reaffirmation of the principle underlying our nation and our Constitution that all persons are entitled to be judged on the basis of their own personal merit, rather than on the basis of some immutable characteristic that has historically been used to discriminate invidiously against an entire class.

Moreover, even if the President may, under certain extraordinary circumstances, suspend entry on the basis of national origin, the Government has not provided sufficient support that such discrimination serves the purported national security justification. The record, thus far, does not support any link between the proffered national security justification and national origin. The Order's national origin discrimination is, therefore, an arbitrary violation of the 1965 Act and the principles it reflects.

A. **U.S. Immigration Policy Had a History of Discrimination on the Basis of Race and National Origin That Was Inconsistent With Our Nation's Values**

Our nation has a regrettable history of policies and laws that have allowed and encouraged discrimination on the basis of national origin in immigration. In the wake of the California gold rush and an influx of Chinese immigrant laborers, Congress passed the Chinese Exclusion Act of 1882, which prohibited all Chinese laborers not already in the United States as of November 17, 1880, from entering. A few years later, in 1888, Congress passed the Scott Act, which "prohibit[ed] Chinese laborers from entering the United States who had departed before [the Act's] passage," even if they possessed "a certificate issued under the act of 1882 . . . granting them permission to return." *Chae Chan Ping v. United States*, 130 U.S. 581, 582 (1889). The Supreme Court upheld those discriminatory statutes against numerous legal challenges. *See*, *e.g.*, *id.*; *Chew Heong v. United States*, 112 U.S. 536 (1884). In doing so, the Supreme Court endorsed the abhorrent motivations for the law: a fear that, because of "differences of race," it "seemed impossible for them to assimilate with our people" and that there was a "great danger that at no distant day that portion of our country would be overrun by them." *Chae Chan Ping*, 130 U.S. at 595.

A few decades later, in 1921, Congress enacted the first set of immigration quotas in American history through the Emergency Quota Act, which limited "the number of aliens of any nationality who may be admitted" to "3 per centum of the number of foreign-born persons of such nationality resident in the United States as determined by the United States census of 1910." Emergency Quota Act of 1921, Pub. L. No. 67-5, 42 Stat. 5. Those quotas, which were temporary, paved the way for Congress to pass the 1924 Johnson-Reed Act, which established a quota system based on 1920 census figures. *See* Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153. By relying on 1920 census numbers, the act discriminated in favor of immigrants from northern and western Europe and against those from southern and eastern Europe. The Johnson-Reed Act also blocked any Asian immigrants from entering the country, as it provided that "[n]o alien ineligible to citizenship shall be admitted to the United States" (*id.*), and federal legislation denied the privilege of naturalization to individuals who were not "free white persons," "aliens of African nativity," or "persons of African descent." *Ozawa v. United States*, 260 U.S. 178 (1922) (holding that federal naturalization statute did not apply to Japanese plaintiff, who was "clearly of a race which is not Caucasian and therefore" could not be classified as "white" within meaning of statute). This racist view was later a principal source of the Japanese internment during WWII and one of the most regrettable decisions in our judicial history, *Korematsu* v. *United States*, 323 U.S. 214 (1944).

The invidious and discriminatory purpose of the Johnson-Reed Act was plain. Senator David A. Reed, one of the statute's authors, wrote in a *New York Times* op-ed that, with this quota system, "[t]he racial composition of America at the present time thus is made permanent." Sen. David A. Reed, *America of the Melting Pot Comes to an End*, N.Y. TIMES, Apr. 27, 1924, at xx 3.

It was also under cover of these annual quotas, as well as other restrictive immigration policies, that thousands of Jewish refugees attempting to flee Nazi Germany were denied entry to the United States. *See* David S. Wyman, THE ABANDONMENT OF THE JEWS 6 (1st ed. 1984). Infamously, in 1939, the MS St. Louis, a boat carrying nearly a thousand Jewish refugees, was denied permission to dock in the port in Miami. A State Department telegram sent to a passenger stated they must "await their turns on the waiting list and qualify for and obtain immigration visas before they may be admissible into the United States." *Voyage of the St. Louis*, UNITED STATES HOLOCAUST MUSEUM, https://www.ushmm.org/wlc/en/article.php?ModuleId=10005267 (last visited Apr. 8, 2017). But under the 1924 act, there was a limited quota allotment and a years-long waiting list. The MS St. Louis returned to Europe, and many of its passengers were murdered in concentration camps.

Restrictive immigration policies continued post-WWII. In 1952, Congress enacted a statute that, while ending the wholesale exclusion of Asian immigrants, perpetuated national origin discrimination through quotas. Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163. Those quotas continued to provide for greater admission of western and northern European immigrants, and minimal allowances for immigrants from southern and eastern Europe, Africa, and Asia. Dissenting members of Congress decried the bill for "inject[ing] new racial discriminations into our law, establish[ing] many new vague, and highly abusable requirements for admission," and for, "contrary to public demand, fail[ing] to modify present arbitrary restrictions on immigration. . . ." S. Rep. No. 82-1137, pt. 2, at 2 (1952) (minority views of the Senate Committee on the Judiciary). President Truman also exercised his veto authority, calling the quota system "at variance with our American ideals." H.R. Doc. No. 82-520 at 2 (1952). He continued:

> The greatest vice of the present quota system, however, is that it discriminates, deliberately and intentionally, against many of the peoples of the world. The purpose behind it was to cut down and virtually eliminate immigration to this country from southern and eastern Europe. . . .
>
> The idea behind this discriminatory policy was, to put it baldly, that Americans with English or Irish names were better people and better

> citizens than Americans with Italian or Greek or Polish names . . . . It violates the great political doctrine of the Declaration of Independence that "all men are created equal." It denies the humanitarian creed inscribed beneath the Statue of Liberty proclaiming to all nations, "Give me your tired, your poor, your huddled masses yearning to breathe free."

Id. at 3-4.

Over those strong objections, Congress overrode President Truman's veto and enacted the 1952 Act, which remained our nation's primary immigration law until 1965.

B. **The 1965 Immigration and Nationality Act's Ban on National Origin Discrimination in the Issuance of Immigration Visas Is a Broad Congressional Statement That Such Discrimination Is Inconsistent With Our Immigration Policies**

Within a decade after the passage of the 1952 Act, both Congress and the Executive sought to eliminate the quota system, recognizing that national origin discrimination in the immigration context lacked logic and violated fundamental American principles. That goal was achieved with the Immigration and Nationality Act of 1965.

On July 23, 1963, President Kennedy sent Congress a proposed bill that would "most urgent[ly] and fundamental[ly] reform . . . the national origins system of selecting immigrants." Presidential Letter of Transmittal, July 23, 1963. In a letter accompanying the proposed bill, President Kennedy emphasized that "[t]he use of a national origins system is without basis in either logic or reason," and that the new legislation would "provide a sound basis upon which we can build in developing an immigration law that serves the national interest and reflects in every detail the principles of equality and human dignity to which our nation subscribes." *Id.*

Shortly after President Kennedy submitted the proposed bill, Senator Philip Hart and Representative Emanuel Celler introduced versions of the bill to Congress. Senator Hart described the "principal effort" behind the bill as "the elimination of a mistake that was made in the twenty's and has lived with us ever since in this business of the origins system." *Hearings Before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary on S. 500*, 89th Cong. 4 (1965). Similarly, Representative Celler told Congress:

> The fundamental feature . . . is the elimination from our laws of the fallacious belief that the place of birth or the racial origin of a human being determines the quality or the level of a man's intellect, or his moral character or his suitability for assimilation into our Nation and our society.
>
> In searching for a brief and comprehensive description of the underlying principle of my bill I use these words: "We do not intend to ask any immigrant 'Where were you born?' we intend to ask him only 'Who are you and what can you do for the country in which you have chosen to live?'"

Hearings Before Subcomm. No. 1 of the H. Comm. on the Judiciary on H.R. 7700 and 55 identical bills, 88th Cong. 2 (1964).

Those sentiments were echoed more broadly throughout the Congressional hearings. For example, Representative James H. Scheuer labeled the quota system "conceived in hysteria and draped with a mask of myth." *Immigration: Hearings on H.R. 2580 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 89th Cong. 196 (1965) (statement of Rep. James H. Scheuer). And Attorney General Nicholas Katzenbach told the House Committee:

> Under present law, we choose among potential immigrants not on the basis of what they can contribute to our society or to our economic strength. We choose, instead, on the basis of where they—or in some cases even their ancestors—happened to be born. There is little logic or consistency in such a choice, when we proclaim that our system of freedom is superior to the rival system of fear; when we proclaim to all the peoples of the world that every man is born equal and that in America every man is free to demonstrate his individual talents.

Id. at 8 (statement of Att'y Gen. Nicholas Katzenbach). Ultimately, the House Report labeled the "purpose" of the proposed legislation as "the elimination of the national origins system as the basis for the selection of immigrants to the United States" (H.R. Rep. No. 89-745, at 8 (1965)), and to add in its place "a new system of selection designed to be fair, rational, humane, and in the national interest." *Id.* at 12.

On October 3, 1965, President Johnson traveled to Liberty Island, the home of the Statute of Liberty, and signed the bill into law. There, he called the national origin quotas "un-American in the highest sense, because it has been untrue to the faith that brought thousands to these shores even before we were a country," and remarked that the national origins system "violated the basic principle of American democracy—the principle that values and rewards each man on the basis of his merit as a man." Remarks at the Signing of the Immigration Bill, Liberty Island, NY, Oct. 3, 1965.

With President Johnson's signature, the Immigration and Nationality Act of 1965 finally dismantled the national origin quota system created by the 1924 Act and preserved in the 1952 Act. Most importantly, the 1965 Act included the provision now codified as 8 U.S.C. § 1152(a)(1)(A), which states that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's . . . nationality."

Yet despite this historical and legislative backdrop, the Government argues that Section 1152(a) prohibits national origin discrimination only in the issuance of immigrant visas, and that the Executive can nevertheless freely discriminate to prevent foreign nationals from "entry" to the United States. For this proposition, the Government invokes Section 1182(f), which was enacted as part of the 1952 Act, and which provides "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants." 8 U.S.C. § 1182(f). The Government argues that this earlier-enacted provision overrides the later-enacted 1965 ban on national origin discrimination in the issuance of immigration visas, because the President has unlimited power to ban "entry" of a class of persons and that such a ban precludes the issuance of visas.

This argument makes no sense.[6] It would mean that an earlier provision of the immigration law overrides and annuls the specific prohibition against national origin based discrimination enacted by Congress in 1965. The Government's argument would enable the Order to restore the discriminatory policy Congress sought to ban by denying entry solely on the basis of national origin and render meaningless the provision barring discrimination in the issuance of immigration visas. Here, the seemingly conflicting provisions should be harmonized by reading the national origin ban of the 1965 Act as a limitation on the 1952 Act's delegation of power. *See, e.g.*, *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973) ("[A]ll parts of a statute, if at all possible, are to be given effect.").

Moreover, it is a basic canon of statutory interpretation that a specific, later-enacted statute generally governs over an earlier, more general one. *See, e.g.*,

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6 For the reasons that follow in text, *amicus* also respectfully disagrees with the district court's opinion, insofar as it indicates that the 1965 Act would be violated by suspension of the issuance of immigration visas to nationals of the six countries, but not by suspension of entry on the same basis. J.A. 793.

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065, 2071 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one."); *United States v. Juvenile Male*, 670 F.3d 999, 1008 (9th Cir. 2012) ("Where two statutes conflict, the later-enacted, more specific provision generally governs."). That canon applies with special force here, where the later statute is a sweeping rejection of the discriminatory policies of the earlier law and a reaffirmation of national values in the spirit of the contemporaneously enacted Civil Rights and Voting Rights Acts.

Section 1152(a) also exempts other provisions of the Immigration and Nationality Act—but not Section 1182(f)—from the anti-discrimination prohibition. If the 1965 Act intended to exempt Section 1182(f) from the anti-discrimination principle, it could have done so. *See, e.g.*, *United Dominion Ind., Inc.*, v. *U.S.*, 532 U.S. 822, 836 (2001) ("[T]he mention of some implies the exclusion of others not mentioned.").

Nothing in the text or legislative history of the 1965 Act suggests an exemption from its sweeping prohibition against national origin discrimination for Executive branch decisions under Section 1182(f). Taking the Government's argument to its logical conclusion would also mean that the Executive could discriminate based on any of the classifications listed in Section 1152(a)—including race. Rather, the robust legislative history, the overall structure of the statute, and canons of statutory interpretation all compel the conclusion that Congress did not intend to permit the President to exclude from "entry" classes of persons on the basis of national origin.

C. The Order Fails to Show a Facially Legitimate or Bona Fide Reason for National Origin Discrimination

Even if the President were able to suspend entry of persons on the basis of national origin under the 1952 delegation of power, exercise of that power would require a legitimate basis. Without that, the exercise of the power would be arbitrary and inconsistent with the rule of law. In the very few instances where past presidents have invoked Section 1182(f), the suspension of nationals from a particular country was in response to specific and articulable foreign policy events. As examples, President Ronald Reagan suspended entry of Cuban nationals only after Cuba stopped complying with U.S. immigration requirements, *see* Proclamation 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986), and President Jimmy Carter relied on another section of the 1952 Act to delegate the authority to impose restrictions on entry by Iranian nationals during the Iran Hostage Crisis. *See* Exec. Order No. 12,172, 44 Fed. Reg. 67947 (Nov. 28, 1979); Exec. Order No. 12,206, 45 Fed. Reg. 24101 (Apr. 7, 1980); President Carter, Sanctions Against Iran

Remarks Announcing U.S. Actions (Apr. 7, 1980). Unlike the situation here, these actions did not brand the foreign nationals as threats to public safety based solely on their national origin; they were sanctions imposed on foreign governments for violations of international law, comity or the rights of American citizens.

At a minimum, the Executive must have a "facially legitimate and bona fide" reason for national origin based discrimination that would negatively and unlawfully affect United States citizens who have close family, business, or academic relationships with those excluded. *See Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Kerry v. Din*, 135 S. Ct. 2128 (2015) (applying the *Kleindienst* "facially legitimate and bona fide" test to due process claims raised by American citizen whose spouse's application for an immigrant visa was denied).[7] In *Kleindienst*, the Supreme Court reviewed a claim that a consular decision denying a nonimmigrant visa to a Belgian professor denied an American professor's right to hear him speak. The Supreme Court applied the "facially legitimate and bona fide" standard to the American professor's claim. *Kleindienst*, 408 U.S. at 756. The Supreme Court recognized that Congress has "plenary . . . power to make

[7] The Ninth Circuit held that this minimum standard applies only to "a specifically enumerated congressional policy to the particular facts presented in an individual visa application," and not to a "President's *promulgation* of sweeping immigration policy." *Washington* v. *Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017). Because we submit that even the deferential *Kleindienst* standard is not met, we leave this issue to discussion by others.

policies and rules for exclusion of aliens." *Id.* at 769. But when Congress has "delegated conditional exercise of [that] power to the Executive," the Executive must have a "facially legitimate and bona fide reason" to exercise it negatively. *Id.* at 770.

The Order has no "facially legitimate" or "bona fide" reason. At least domestically, national origin is a "suspect classification" because there is so rarely a legitimate purpose for such a classification. Like race, such a classification is "subject[t] to a history of purposeful unequal treatment," *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and like other immutable characteristics, national origin is "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Moreover, the use of such immutable characteristics and the stereotypes associated with them, violates the fundamental principle that each person is entitled to be judged on his or her own personal merits, not on ancestry or place of birth.

The same reasoning applies to national origin as it has been used in the immigration context. *See supra* Part I.B. Therefore, discrimination on the basis of national origin in immigration should be suspect, and the reasons offered to justify it cannot be considered legitimate, but require at least some support to overcome the suspicion that the justification offered may conceal an invidious purpose.

The Order, on its face, fails to provide such support for the national security justification it proffers. For example, the Order cites only two examples of foreign nationals admitted to the United States who later committed terrorism-related acts. The first is the case of two Iraqi nationals admitted as refugees, who were convicted of material support for terrorism in Iraq. *See* Order § 1(h). But the Order no longer lists Iraq as subject to the travel ban. The only other example cited by the Order is that of a Somali national brought here as a three-year old child, who became a United States citizen and later was radicalized in the United States. *See* Order § 1(h); *United States v. Mohamud*, 843 F.3d 420 (9th Cir. 2016). The Order itself recognizes refugee children as priorities for a waiver of the travel ban. Order § 3(c)(v). The Order does not cite any example of a terrorism-related act in the United States by a national from any of the other five countries to which the order applies. And although the Order claims there are 300 refugees who are currently under counterterrorism investigation, *see* Order § 1(h), the Government has provided no information about them, not even where they are from.

A recent Department of Homeland Security draft report acknowledges that "country of citizenship is unlikely to be a reliable indicator of potential terrorist activity" in the United States. J.A. 419. *See also* Am. Compl. for

Declaratory and Injunctive Relief at Ex. 10, *Hawai'i v. Trump*, 17 Civ. 50 (D. Haw. Mar. 8, 2017) (Dkt. No. 64-10). Indeed, the draft report notes that, since March 2011, most of the individuals who have "died in the pursuit of or were convicted of any terrorism-related federal offense inspired by a foreign terrorist organization" were native-born U.S. citizens. *Id.*

Absent support for a link between national security and national origin, the Order is an arbitrary act with no facially legitimate or bona fide purpose, which directly harms Americans with close relationships with persons denied entry by the Order.

II. The Order's National Origin Discrimination Is Not Immune from Judicial Review

The Government also asserts a number of legal doctrines addressed to justiciability, such as standing and ripeness, that all serve the same goal: to insulate the President's unilateral actions from review by the judicial branch. The Government relies most heavily on the delegation of authority to the President to exclude classes of persons when he deems it in the national interest, suggesting it gives the President virtually unlimited and unreviewable power. (*See, e.g.*, Gov't Br. 27-30.)

The Executive, however, does not have unlimited authority to act in the immigration context. Rather, the, "[p]olicies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress," *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012), and the President's power comes with any limitations imposed by Congress on the President, as well as those imposed on Congress itself and the President by the Constitution.

Although Congress has "plenary power" to create immigration law, "that power is subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). And when Congress decides to delegate some of its authority to the Executive, the exercise of that authority is still subject to Congressional and constitutional limits. *See, e.g.*, *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[S]imply because a statute deals with foreign relations" does not mean that the statute can grant the Executive "totally unrestricted freedom of choice."). That is true even where there is statutory silence as to the limits of the Congressional delegation of power. The Executive's exercise of even the most broad, discretionary delegations still cannot be "actuated by considerations that Congress could not have intended to make relevant." *U.S. ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (although INA delegated to Attorney General a "dispensing power" to suspend deportation, it is subject to factors considered relevant by Congress).

In divining those relevant considerations in the immigration context, courts have considered specific statutory provisions in the context of the overall scheme of the INA. For example, in *United States v. Witkovich*, the Supreme Court rejected the argument that a statutory provision delegating supervisory power to the Attorney General over aliens awaiting deportation was unlimited, even though the provision, when "read in isolation and literally," appeared to be so. 353 U.S. 194, 199 (1957). Instead, the Court considered the provision in the "context of [the legislative] scheme," and held that the Attorney General's supervisory power was still subject to certain limitations. *Id.* at 202. Similarly, the Supreme Court has implied "reasonable" time limits for post-removal order detentions of aliens even though the relevant federal statutory provisions are silent on that point. *See Zadvydas*, 533 U.S. at 690. Here, the President's power is limited by the ban on national origin discrimination imposed by the 1965 Act. See Section I.B. *supra*.

To accept the Government's position would be to ignore the basic role assigned to the judiciary in our system of separation of powers. As James Madison explained in presenting the Bill of Rights to Congress:

> If [these rights] are incorporated into the Constitution, independent tribunals of justice . . . will be an impenetrable bulwark against every assumption of power in the Legislative or Executive . . . .

1 *Annals of Cong.* 457 (Joseph Gales ed., 1834). This bedrock principle is true even in times of war and terror. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 (1866) (citations omitted) (rejecting argument that, during war, the President

becomes the "sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (President lacked inherent power to establish military commissions that violated the laws of war and Uniform Code of Military Justice, despite dangers posed by petitioner and other terrorism suspects).

"Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by these checkpoints." *Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1237 (2015) (internal citation omitted). In this case, judicial review is the accountability check point to see to it that the Executive does not exceed the limits imposed by the Constitution and the 1965 Act.

CONCLUSION

For all of the above reasons, the order of the District Court should be affirmed.

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Respectfully submitted,

/s/ Sidney Rosdeitcher

SIDNEY S. ROSDEITCHER*
AIDAN SYNNOTT
ERIN J. MORGAN
ARIANNA MARKEL
JARED S. STEIN
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

LINDA A. KLEIN
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 60654
Phone: (312) 988-5000
abapresident@americanbar.org

**Counsel of Record*

Counsel for Amicus Curiae
American Bar Association

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I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit through the CM/ECF system on April 19, 2017, which will automatically serve all parties.

Dated: April 19, 2017

/s/ Sidney Rosdeitcher